Supreme Court, U.S.
FILED
MAR 15 1995
OFFICE OF THE CLERK

No. 94-1390

In The

Supreme Court of the United States

October Term, 1994

LAWRENCE A. WILLIAMS, MANSION W. CLARK, and DONALD F. MERRIWEATHER,

Petitioners,

v.

KARL NAGEL and STEVEN W. BARRICK doing business as CHAMPAIGN HOUSING ASSOCIATES, a partnership doing business as PARKSIDE AND MANSARD SQUARE APARTMENTS; STEVEN W. BARRICK AND ASSOCIATES; THE NAGEL GROUP, INC., an Illinois Corporation; and THE CITY OF CHAMPAIGN, a Municipality; DONALD HANNA; and DON CARTER,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR CITY OF CHAMPAIGN, DONALD HANNA AND DON CARTER RESPONDENTS IN OPPOSITION

MICHAEL R. CORNYN
Counsel of Record
THOMAS, MAMER & HAUGHEY
30 E. Main, P.O. Box 560
Champaign, IL 61824-0560
(217) 351-1500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether the arrest of a person for trespass who has been barred by management of a privately owned apartment complex, pursuant to agreements between management and tenants in the lease, and who has been served with a notice informing him that if he returns to the premises he will be arrested for trespass is constitutionally infirm because the arrested person claims to have been invited by a tenant.

Whether 42 U.S.C. § 1983 imposes liability on a city for the arrest of a person for trespass where that person has been barred from the premises of a privately owned apartment complex by management pursuant to lease terms and where: 1) management sometimes, but not always, relies upon police information and advice in making the decision to bar individuals; and, 2) the statutory notice is sometimes, but not always, served by police officers upon the barred person.

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdictional Statement 2

Statement of Facts 2

Exposition of Opinion Below 4

Argument 7

Conclusion 11

TABLE OF AUTHORITIES

Page

CASES:

Blum v. Yaretsky, 457 U.S. 991, 73 L.Ed.2d 534, 102 S.Ct. 277 (1982) 5, 10

Cape Cod Nursing Home Council v. Rambling Rose Rest Home, 667 F.2d 238 (1st Cir., 1981) 10

Hudgens v. N.L.R.B., 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976) 10

Illinois Migrant Council v. Campbell Soup Company, 574 F.2d 374 (7th Cir., 1978) 10

People v. Yutt, 231 Ill.App.3d 718, 597 N.E.2d 208 (3d Dist., 1992) 10

State of Wisconsin v. Horn, 126 Wis.2d 447, 377 N.W.2d 176 (1985) 11

STATUTES:

42 U.S.C. § 1983 4

Ill.Rev.Stat. Ch. 38, ¶ 21-3 (1991) 2, 7, 8

No. 94-1390

In The

Supreme Court of the United States

October Term, 1994

LAWRENCE A. WILLIAMS, MANSION W. CLARK, and DONALD F. MERRIWEATHER,

Petitioners,

v.

KARL NAGEL and STEVEN W. BARRICK doing business as CHAMPAIGN HOUSING ASSOCIATES, a partnership doing business as PARKSIDE AND MANSARD SQUARE APARTMENTS; STEVEN W. BARRICK AND ASSOCIATES; THE NAGEL GROUP, INC., an Illinois Corporation; and THE CITY OF CHAMPAIGN, a Municipality; DONALD HANNA; and DON CARTER,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR CITY OF CHAMPAIGN, DONALD HANNA AND DON CARTER RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the Illinois Supreme Court is reported in *Williams, et al. v. Nagel, et al.*, 162 Ill.2d 562, 643 N.E.2d 816. The opinion of the Appellate Court of

Illinois for the Fourth Judicial District is reported in 251 Ill.App.3d 176, 620 N.E.2d 1376.

JURISDICTIONAL STATEMENT

Petitioners have invoked jurisdiction under 28 U.S.C. § 1257(a) and 28 U.S.C. § 2403(b) claiming that the interpretation of the Illinois Supreme Court of its trespass statute, Ill.Rev.Stat. Ch. 38, ¶ 21-3(c) (1991) calls that statute's constitutionality into question.

STATEMENT OF FACTS

(This statement of facts is taken from the decisions of the Illinois Supreme Court and Appellate Court or the pleadings contained in the Appendix to the Petition.)

Petitioners Williams and Clark were notified by the owners of Parkside and Mansard Square Apartments that they were barred from the premises and that they would be arrested for trespass if they entered the property. Williams and Clark allege that subsequently they were arrested for trespass but they were not convicted. (Pet.App. 45, 51.) Petitioner Merriweather pleads he received his notice from two Champaign police officers. (Pet.App. 52.) Merriweather, however, was convicted of trespass and also was barred from the premises in that proceeding by order of the circuit court. (Pet.App. 30.) All three Petitioners claim that despite these notices they had been invited to the premises by tenants and their arrests were therefore unlawful.

Parkside and Mansard Square Apartments are privately owned. Its tenants live on the premises under a lease and certain written "rules and regulations." The rules are provided for in the lease and the "Rules and Regulations" reserve to management the right to bar persons from the premises. (Pet.App. 4.) The Petitioners are not tenants. (Pet.App. 5.)

Donald Hanna, the former Chief of Police for the City of Champaign, in an affidavit submitted in support of a Motion for Summary Judgment, testified that there was no policy, custom or practice of the police department to bar persons from the Parkside/Mansard premises but that if persons were barred by the management of the apartments those persons were subject to arrest by the police for trespass. (Pet.App. 9, 29.) Don Carter, the then "Acting" (now) Chief of Police for Champaign, said that there is no policy of the Police Department to bar persons from those premises and that the police department did not make the decision to bar these Petitioners. Carter also said that police officials met with various groups including management of the apartments, tenants, concerned citizens and the State's Attorney, to discuss means and methods to bring a greater degree of safety and security to the residents. (Pet.App. 9, 29-30.)

At these meetings the trespass laws were discussed. It was emphasized at these meetings that property owners and not the police have the authority to bar persons from private property and that the police can arrest for trespass only if the property owner has barred them. Carter said that police officers have occasionally

served the barring notice upon individuals but the decision to bar is management's. Carter also said that sometimes police provide information and advice to management concerning individuals who have been observed on the premises. Sometimes this advice is followed by management and sometimes it is not. (Pet.App. 9, 30.)

Pat Jeffers, the Vice-President of the owner of the Apartments, testified in her affidavit that the management maintains a "no-trespass list" over which it has complete and total discretion. While police officers sometimes serve the written notice upon individuals, the decision to place those individuals on a "barred list" is solely that of management. (Pet.App. 8.)

EXPOSITION OF THE DECISION BELOW

This case was brought under 42 U.S.C § 1983 in counts for injunctive relief and damages against the owners of a privately owned apartment complex, the City of Champaign and its Police Chief and Assistant Police Chief. (Only the counts for injunctive relief are contained in the Appendix to the Petition.) The theory against the City was that it had a custom, policy or practice that was tantamount to controlling which persons would be placed on a "no trespass" list maintained by the management of the complex. (No issue of class based or invidious discrimination in determining who would be placed on this list is raised by the pleadings nor has it ever been argued

at any level.) The case was decided in favor of all Respondents in the trial court on Motions for Summary Judgment supported by affidavits. The Appellate Court for the Fourth Judicial District of Illinois affirmed. The Illinois Supreme Court granted leave to appeal and also affirmed in a 5-2 decision with a written dissent.

The Illinois Supreme Court held that these Petitioners were not excepted from the provisions of Illinois trespass law because the "invitations" that they claimed to have were invalid. (Pet.App. 12-13.) This holding follows from the lease provisions under which the tenants agreed that management could bar persons from the premises. Since the Petitioners had been barred by management, served with notice and placed up a "no trespass" list, the tenants' subsequent invitation was invalid. Since they were not "invited" Petitioners were not excepted from the trespass statute. (Pet.App. 12-13.)

The Illinois Supreme Court also held, citing *Blum v. Yaretsky*, 457 U.S. 991, 73 L.Ed.2d 534, 102 S.Ct. 277 (1982), that there was not a sufficiently close nexus between the police officers' conduct and the property owners' actions to justify holding the City responsible for the owners' acts in barring of individuals from its premises. (Pet.App. 11.) The uncontroverted evidence upon which this holding is based establishes that management had complete discretion to determine who would be placed upon its "no trespass" list. (Pet.App. 10.) Management would sometimes receive advice or information from police officers about individuals but management would not always follow that advice. Sometimes, on behalf of management, police officers would serve written notice to individuals informing them that they were barred. The

Illinois Supreme Court indicated its view that this was sometimes "borne out of necessity" because "police were often present to disperse unruly groups and intervene in altercations as they arose in the complex." (Pet.App. 9.) (Neither Williams nor Clark were served by police officers. (Pet.App. 5, 51.)) The court found that Petitioners had failed to raise any question of material fact in this regard. Because there was no evidence that the Champaign Police Department placed individual names on the list or exercised coercive power over the owners to decide which individuals should be on the list, the owners' acts of barring individuals was held to be purely private action for which the City should not be held responsible. (Pet.App. 11.)

The dissenting justices had two points of disagreement with the majority. First, they felt that even if the invitations were invalid the proper remedy for the landlord was to take civil action for breach of lease against the tenant rather than criminal action against the invited person. (Pet.App. 14-15.) In the dissenters' view, the fact of the invitation, valid or not, made the arrests unlawful. (Pet.App. 15.) Secondly, the dissent felt that enforcement of the trespass law to aid management in controlling its premises was an abuse of the criminal law. Thus, because the arrests were unlawful and the enforcement scheme an abuse, the dissent felt there was sufficient basis to hold the City liable. (Pet.App. 16.)

ARGUMENT

The decision by the majority Illinois Supreme Court was correct. The first premise of the Petitioners, and of the dissenting opinion, that the arrests were unlawful and without probable cause is wrong. Probable cause was established in Petitioners' pleadings. Whether Petitioners were excepted from the trespass law because they had invitations turns upon construction of Illinois law regarding exceptions to Illinois' general law of trespass. It is not an issue that should be reversed by this Court. The second issue, whether there was a sufficiently close nexus between the actions of the owners and the police to impose liability upon the City for actions of the owners in barring the individuals was also correctly determined. Moreover, the issue is fact bound and is not in conflict with federal decisions in any event.

1. Petitioners claim a right of entry to the premises of a privately owned apartment complex because they were allegedly invited by tenants even though they had been barred from the premises by the management of the complex. They claim this right under subsection (c) of § 21-3 of the Criminal Code of the State of Illinois. Ill.Rev.Stat. Ch. 38, ¶ 21-3(c) (1991), now found in 720 ILCS 5/21-3(c). Under § 21-3 a person who has been given notice by the owner that entry to the premises is forbidden is guilty of a misdemeanor if he subsequently enters the premises. However, subsection (c) provides that this section is not applicable to one who is invited to the premises by a tenant. Petitioners have pleaded that they were given such statutory notice and were subsequently arrested when they re-entered the premises. They claim that their arrests were unlawful because they were

invited. Because of the invitation the dissenting justices in Illinois felt there was no probable cause for the arrests.

There are two issues in this analysis. First, were Petitioners "invited" so as to be excepted from the provisions of the trespass statute; and second, was there probable cause for the arrests? On the first question, the Illinois Supreme Court held that under Illinois law the "invitations" were invalid because tenants had no authority to invite these persons to the premises. The lease provided that management had the right to bar persons and, therefore, held the Court, any attempt to invite persons who had already been barred by management was invalid. One who has an invalid invitation is not an invitee within the meaning of § 21-3(c).

This determination is a construction of Illinois law and raises no Constitutional issue. The leases are between a private owner and private citizens. Petitioners are not parties to the leases and their standing to attack them is doubtful. Petitioners do not argue that because of their status as "invitees" they have any constitutional rights to enter this property. Petitioners do not attack the constitutionality of the Illinois trespass statute. Rather, Petitioners claim a "right" to be excepted from the trespass statute through the terms of subsection 21-3(c). As a matter of state law and on the facts presented, the Supreme Court of Illinois has held that exception does not apply.

As to the probable cause issue both Petitioners and the dissenting justices are wrong. Petitioners have pleaded facts that give rise to probable cause. They received notice that entry was forbidden and they reentered the premises prior to arrest. Even if the invitation

was valid – a position *not* taken by the dissenting justices – that invitation would not negate probable cause. The fact of invitation, like a defense to any other criminal charge, is something outside the elements of the offense charged which might be raised in defense. It does not make the arrest unlawful.

In this case, the majority held that Petitioners were not entitled to that defense because they were not "invitees" under the statute. Because they were not invitees excepted from the statute, their arrests based upon prior notice and subsequent re-entry – facts established on the record – were lawful. This question turns upon construction of Illinois law and does not raise constitutional issues.

2. The Illinois Supreme Court also correctly determined that there was an insufficient nexus between the conduct of the police and the actions of the apartment owners to impose liability upon the City. Petitioners alleged that the City had a custom, policy or practice that was tantamount to controlling who was placed on the "no trespass" list. Petitioners, however, had no evidence to support that claim. The evidence from both the City and management established that management had complete control over the list and had sole discretion and authority to place names upon it. The record establishes that the Police Department received no policy directive from the City to bar persons. (Pet.App. 29.) Only management and not police officers could make such decisions. The record indicates that the management would sometimes receive information or advice from police officers but that advice was not always followed. Police officers sometimes served the required notice but did not serve either Clark

or Williams. Whether the police or someone else served the notice, the decision to place a person on the "no trespass" list was management's. There was no evidence remotely suggesting that the police used coercive power over management to bar any individuals. See *Blum v. Yaretsky*, 457 U.S. 991, 1004, 73 L.Ed.2d 534, 546, 102 S.Ct. 2777, 2786 (1982).

Whether involvement by the police in private actions is sufficient to make the City liable for the private action is, necessarily, a case-by-case factual inquiry. Here, the involvement by police was limited to providing occasional information and advice. That advice was followed sometimes and sometimes it was not. Respondents are unaware of any case which forbids that kind of activity by police officers. Nor are Respondents aware of any case forbidding a private landowner who, without unlawful, discriminatory intent, bars persons from its premises and relies upon police officers to enforce the criminal trespass law.

Contrary to the dissenting justices' view that trespass law should not be used to aid management's attempts to control its premises, trespass laws are designed to accomplish that very result. The statute recognizes a landowner's right to protect his property interests. *People v. Yutt*, 231 Ill.App.3d 718, 597 N.E.2d 208, 214 (3d Dist., 1992). This right of an owner to control property and to control visitors upon it has been recognized in a number of different cases. *Hudgens v. N.L.R.B.*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976) (shopping centers); *Illinois Migrant Council v. Campbell Soup Company*, 574 F.2d 374 (7th Cir., 1978) (migrant labor camps); *Cape Cod Nursing Home Council v. Rambling Rose Rest Home*, 667 F.2d 238

(1st Cir., 1981) (nursing homes); *State of Wisconsin v. Horn*, 126 Wis.2d 447, 377 N.W.2d 176 (1985) (medical clinic) are examples where access was denied even over claimed constitutional rights. The Illinois Supreme Court has held a landowner's right, obtained by agreement with its tenants, to exclude persons from his property and to rely upon the enforcement of criminal trespass law. This decision is not in conflict with federal law.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL R. CORNYN
Counsel of Record
THOMAS, MAMER & HAUGHEY
30 E. Main St., P.O. Box 560
Champaign, IL 61824-0560
(217) 351-1500
Attorneys for Respondents